

Testimony to the Senate Committee on Commerce, Science and Transportation
Hearing on "Fraud: Targeting America's Seniors"

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INTRODUCTION

Thank you for the opportunity to speak to you about the role of undue influence in elder financial abuse. This is an important topic, because the issue of self-determination lies at the heart of many financial abuse cases. In general, adults have the right to spend money in any legal manner, and there is nothing wrong with giving money or property to friends, family, or organizations. However, our society has decided that people also have a right to not be victimized by unscrupulous persons, and we have laws protecting many classes of individuals, for example, consumers, the handicapped, and children. The law also recognizes that some situations, such as fraud or racketeering, are, by their nature, criminal. When there has been possible financial abuse of an elder or dependent adult, two questions are usually raised: Did the elder (or dependent adult) have the mental capacity to make a competent decision? Was the elder (or dependent adult) inappropriately manipulated, and therefore unduly influenced? Answering these questions has been difficult. The legal definitions of undue influence are filled with tautologies, imprecise terms, and vague concepts. Assessing mental capacity is easier, but most philosophical and medical approaches are confusing or inadequate. This report will focus on the nature of elder financial abuse, its relationship to other crimes, impact on elders, their families, American businesses, and depletion of government and community resources, the role of undue influence and the methods used by perpetrators, and the importance of understanding and using a functional assessment of mental capacity. The report concludes with suggestions for addressing the pertinent issues.

INCIDENCE AND PREVALENCE OF ELDER FINANCIAL ABUSE

Nobody knows the true incidence or prevalence of elder financial abuse. All of the research studies have serious limitations or flaws. In the United States, researchers believe that only one out of five, and some say one out of fourteen, cases are reported to authorities. Studies from Canada and Great Britain indicate that 2-3% of the population over the age of 65 say they have been financially victimized by family members. The amount of financial abuse perpetrated by non-relatives is not known. If this rate is the same in the United States, then there are approximately 1 million elderly victims. In contrast, a study released by the National Center on Elder Abuse suggests there were only about 150,000 elderly victims in 1996. The NCEA study has been criticized for underestimating the incidence of all forms of elder abuse due to methodological problems. Finally, anecdotal reports from experts in various fields suggest as many as one out of five people will be a victim of elder financial abuse.

There is also lack of agreement regarding the amount of money or property taken from individual victims. The lower reported range for average losses is between \$8,000 -

\$20,000. Considering this, and assuming the most conservative incidence data, the minimal annual loss ranges from \$1.2 to \$4 billion. The actual loss is probably much greater.

There are many reasons why financial abuse cases are under-reported. Issues involving the victims include:

1. Death.
2. Incapacity.
3. Fear of retaliation.
4. Fear of losing independence at the hands of authorities or their families.
5. Shame or humiliation.
6. Many victims are intimidated by the police and judicial system.

Societal factors include:

1. Anti-Aging Biases
2. Mistaken or Inadequate Understanding of Mental Capacity
3. Mistaken or Inadequate Understanding of Undue Influence
4. Mistaken belief these cases are not criminal. This belief is referred to as the "civil mirage."

VULNERABILITY OF ELDER AND ASSOCIATED CRIMES

The elderly are vulnerable for several reasons. According to government statistics, people over 65 have more than 50% of all the money in personal savings accounts, own more than 75% of all personal property, and have accumulated personal financial assets exceeding \$1 trillion. The elderly are also subjected to numerous physical and mental illnesses, social isolation, life transitions, and cultural biases, which makes manipulation easy to do and difficult to prosecute. The ease, potential gain, and low risk of the crime attract many criminals including drug addicts and dealers, prostitutes, thieves, and con artists. After obtaining the money, many perpetrators neglect the elder, causing physical and emotional hardship. In addition, financial abuse is often connected to other crimes such as assault, battery, robbery, rape, drug trafficking, prostitution, and homicide. Some perpetrators specifically neglect or overmedicate their victims to cause their deaths.

SOCIETAL IMPLICATIONS OF ELDER FINANCIAL ABUSE

Medical conditions develop or worsen because of co-existing neglect or physical abuse by perpetrators, development of depression, and possible loss of homes. It is not unusual to learn that a victim is not receiving necessary medications. The victim may be neglected, or

may no longer have enough money to purchase both medications and food. Both common sense and research suggest that these people require more medical and social service attention, may require specialized housing that was not needed before the abuse, and may have a higher mortality rate than people who have never been abused.

American businesses are also affected. Thirty-five percent of the American workforce is responsible for eldercare. According to recent studies, this creates indirect costs to companies because of time spent by employees seeking and providing assistance to elders. Employees often consider eldercare needs to be more pressing than childcare issues. Anecdotal reports suggest that employees spend a significant amount of time and energy worrying about possible or actual financial victimization of elderly relatives. The total indirect expense to American business is estimated to be \$29 billion annually.

VICTIMOLOGY

It is thought that the typical victim is female, older than 80, White, physically frail, and may be confused. In reality, anyone may become a victim. Elder financial abuse occurs in all socioeconomic and racial groups. The only "color" that is important to a perpetrator is green.

As in cases of child abuse and domestic violence, many victims of elder abuse try to protect their abusers. This is done for many reasons, including emotional manipulation by the abuser, fear of reprisal, and dependence upon the abuser. These victims will not cooperate with medical personnel, investigators from adult protective services, or law enforcement. It is not unusual that they lie to protect the perpetrator.

Mrs. C was a wealthy, widowed, physically fragile woman in her 80's. Her daughter brought Mrs. C to her home, where Mrs. C was forced to in a bunk bed with her grandchildren. Mrs. C was confined to the bedroom most of the time. Investigators became involved when Mrs. C did not return home. They learned there was an unusually large amount of activity in her bank accounts, most related in some way to her daughter. Mrs. C told Adult Protective Services investigators that she was happy living with her daughter, son-in-law, and grandchildren. However, an astute police officer learned enough information to convince a court to issue an order removing Mrs. C from the premises for medical evaluation and treatment. When Mrs. C left her daughter and was alone with the officer, she began to cry, thanking the officer for saving her life. When asked why she had said she wanted to live with her daughter and son-in-law, Mrs. C replied, "I knew they were keeping me alive while they found ways to get my money. I thought they would stop giving me my medicines or kill me if I stopped giving them the money, and I was afraid of what they would do if I

complained. Every day I was there was not a day I survived, it was a day I hadn't failed yet."

PERPETRATORS

Typical perpetrators include both men and women, who are often younger than 60, but not necessarily. The NCEA study suggests that more than one-third were older than 60, and more than 25 percent were over the age of 70. It is often assumed that most perpetrators are the children or spouse of the victim; however, existing research has not been able to adequately track or analyze abuse caused by non-family caregivers or acquaintances. Perpetrators generally work alone, but cases involving multiple perpetrators are not rare.

There are two general categories of perpetrators – opportunists and predators. "Opportunists" are people who begin a relationship with an elder with good intentions; however, they later believe they deserve or are entitled to use, take, or inherit the elder's assets. They become perpetrators when they act on these beliefs. Most opportunist perpetrators are family members or friends of the elder. They often have no history of criminal behavior.

"Predators" are people who seek out elders to victimize. They often have a history of illegal behavior. Predators tend to seek out potential victims by frequenting "victim-rich" environments, such as senior centers, nursing homes, support groups, churches or synagogues, continuing education classes, libraries, or supermarkets or restaurants known to cater to elders. They may obtain jobs in or around private homes, hospitals, or pharmacies. Predators also often review obituary columns for names of bereaved relatives, whom they then target. Predators may conduct surveillance on an elder before arranging to meet him or her.

TYPES OF FINANCIAL ABUSE

"Elder financial abuse" refers to many types of fraudulent or abusive practices. This report will only address abuse perpetrated by acquaintances, caregivers, or family members. This is often referred to as "brand new best friend" situations. Fraudulent telemarketing, mail order, or internet practices will not be discussed, nor will general fraudulent schemes.

THE ROLE OF UNDUE INFLUENCE AND MENTAL CAPACITY ASSESSMENTS

As mentioned in the introduction, the issues of mental capacity and undue influence are critical for evaluating cases of elder financial abuse. A common mistake is to confuse the terms. "Mental capacity" refers to the elder's cognitive abilities. Assessments of mental capacity directly evaluate the capabilities of the person in question. In contrast, "undue influence" refers to manipulation resulting from a relationship between a perpetrator and a victim. Undue influence evaluations assess the impact of the perpetrator's behavior upon the elder or dependent adult. Susceptibility to undue influence may be affected by the elder's environment, medical and psychological factors, and mental capacity.

UNDERSTANDING UNDUE INFLUENCE

A thorough understanding of undue influence requires knowledge of the tactics used in cults, swindles, hostage situations, and prisoner of war camps. As such, the topic is too extensive to be adequately addressed in this brief report, but some common behaviors are listed below. The process of inappropriate manipulation through psychological means has been extensively studied, and several models have been proposed. Most require specialized knowledge, and are therefore not feasible for general use. A model was developed that is practical and usable by non-specialists. According to this model, four psychosocial conditions must co-exist for undue influence to occur. The four conditions are:

1. Dependence upon the perpetrator.
2. Isolation of the victim from pertinent social contacts or information.
3. Emotional manipulation of the victim.
4. Gaining control of the victim's money or property [Blum, 1998].

Dependence – This may be physical or emotional dependence. Most relationships are normal and appropriate; however, the creation of a special, dependent relationship in conjunction with isolation and emotional manipulation is suspicious.

Isolation – Although abduction and restraint of elders occurs in some instances, merely preventing an elder from obtaining important information from family, friends, or professional advisors is more common. Many times, the elderly victim is already isolated due to medical or interpersonal problems. When isolation is used in conjunction with emotional manipulation, perpetrators often convince the victim that others are planning to take the elder's belongings and abandon him. The perpetrator creates an "Alice-in-Wonderland" vision in which the manipulator is portrayed as the only savior. The victim may display new or unusual behavior (e.g. accusing others of trying to steal his money), as well as demonstrate fear, anxiety, distrust, affection, and dependence regarding the perpetrator. The victim then often lies to keep away family, friends, police, or Adult Protective Service investigators.

As a result of the dependent relationship, biased information, and emotional manipulation, the elderly victim often agrees to give the perpetrator money or property, or allows the perpetrator to use the money or property for his own benefit. This behavior initially seems voluntary, but it is not. It is based on false or misleading information and promises. Once the perpetrator gains access to his victim's assets, the elder is often neglected, and may be physically abused or killed. If the elder is murdered, the most common methods are: neglect – leading to illness and death; withholding, overdosing, or giving inappropriate medication; or suffocation. This information is based upon anecdotal accounts of elder murders. There are no formal studies addressing this question.

The following are true cases of undue influence. In each, there are examples of dependent relationships, isolation, emotional manipulation, and relinquishing of assets.

A wealthy 82 year-old widower gives most of his money, jewels, and property to his new 60 year-old girlfriend. In his last conversation with his children he says, "I know she will leave if I stop, but it is better than being lonely." He does not speak to his children again because his girlfriend threatens to leave him.

An infirm woman in her 70's is cared for by a 35 year-old neighbor. After several months, the woman suddenly accuses her daughter of wanting to steal her money. The caregiver repeatedly prohibits the woman's daughter and friends from visiting or speaking to her. The woman changes her will, leaving her entire estate to the caregiver.

A young woman introduces herself to an elderly man at a restaurant. She tells him she is a nurse and offers to provide home care. He agrees. He has no family interested in maintaining a relationship with him, and she quickly becomes his sole friend and confidant. She then convinces him to add her name to his bank accounts. She withdraws over \$150,000 to purchase cars and drugs, convinces him to marry her soon after learning she is being investigated for elder abuse, and later starves him to death. Investigators discover she has an extensive criminal record of prostitution and drug offenses.

This four-point model of undue influence has been used in the evaluation of hundreds of cases, and has been useful to many law enforcement personnel, prosecutors, civil attorneys, Adult Protective Service investigators, and members of the general public. Using this approach, many agencies are able to more rapidly and accurately assess cases, and convey the necessary information in a concise and compelling manner. Expert

consultants are still needed in complex cases, but overall, this approach saves time, resources, and money.

Table #1 – Common Behaviors in Undue Influence Situations

Withholding mail.
Limiting telephone access.
Limiting visitation.
Limiting privacy when victim is with others.
Discussion of transaction at an unusual or inappropriate time.
Consummation of the transaction at an unusual place.
Use of multiple persuaders against a vulnerable single person.
Demand the business be finished at once.
Extreme emphasis on the consequences of delay.
Obtaining an attorney, or Power of Attorney/bank forms.
Using victim's property, money, credit cards, etc.
Becoming conservator, Trustee, beneficiary, executor, etc.
Obtaining access to bank accounts.
Obtaining access to safety deposit boxes.
Having the victim name the perpetrator on Power of Attorney forms.

CURRENT MODELS OF MENTAL CAPACITY

The two most common models of mental capacity are the "philosophical/legal" and "medical" models. The philosophical/legal model describes mental capacity as the combination of the abilities to express one's desires, understand the pertinent risks and benefits, appreciate the ramifications of a decision, and think rationally. These four components comprise the basic elements in all State laws, although they may be combined, or re-phrased. The main weakness of this model is the lack of agreement regarding the definitions and assessments of each term and phrase.

The medical model proposes linking the presence of medical conditions to incapacity. According to this theory, neurological or psychiatric signs and symptoms indicate cognitive impairment. The strengths of this model are its ability to define cognitive impairments in terms of medical pathology, recommend treatment, and make prognostic statements. The primary weaknesses are the questionable association between medical findings and "real world" functioning; and its requirement of medical or neuropsychological expertise, which limits its usefulness in many elder abuse investigations.

THE FUNCTIONAL MODEL OF MENTAL CAPACITY

Functional models focus upon the elder's behavior. Several mental abilities must be intact to make an informed, reasoned, and rational decision. Impairment in any step indicates the need for further investigation. Although various models have been proposed, the following is one of the most practical and adaptable:

In order to make an informed, reasoned, and rational financial decision, a person must be able to do the following:

- I. Express His or Her Desires
- II. Understand Pertinent Issues – This Includes:
 - A. Learn New Information
 - B. Focus on Relevant Information
 - C. Remember the Information
 - D. Know the Pertinent Parties and Their Responsibilities
 - E. Know the Major Options
 - F. Know the Likely Consequences for Each Option
 - G. Reason About the Options and Consequences
 - 1) Using Abstract Concepts
 - 2) Thinking Strategically
 - 3) Thinking Without Delusions
- III. Make the Decision – This Includes:
 - A. Choosing an Option
 - B. Maintaining a Decision [Blum, 1998; similar in White, 1994]

The most important, but often unrecognized or overlooked, capability is the ability to "think strategically." When impaired, a person cannot readily assess the ramifications of his decisions. Subtle signs of dysfunction are usually dismissed as trouble concentrating, mild memory loss, eccentricity, or personal rigidity. Although such conditions and personality styles exist, new onset or exacerbation of these behaviors suggest early impairment of "executive functions" (described below) and require psychiatric

investigation.

"EXECUTIVE FUNCTIONS"

Medical disorders may cause blatant or subtle behavioral changes. As noted earlier, one important set of mental abilities to be analyzed are the abilities to plan, organize, and carry out actions. These are also known as "executive functions." These functions are used to shift focus, analyze tasks, form concepts and strategies, and evaluate one's own behavior. They are critical to attention, memory, and learning.

Impairment of executive function is usually found in the elderly who have psychiatric disorders. It is seen in dementia, delirium, severe depression, and mania. It often occurs before there are other, more noticeable, neurological problems.

Behavioral problems include: 1) impaired organization of material to be learned; 2) poor recall of recent and remote information; 3) automatic imitation of the gestures and actions of others; 4) automatic use of objects in the environment [see Case #1 below regarding the checkbook]; and 5) unnecessarily repeating words, phrases, or actions. Other common co-occurring behaviors include: 1) irritability; 2) tactlessness; 3) impulsivity; 4) undue familiarity; 5) absence of social constraint; 6) fatuous and inappropriate euphoria; 7) rapid mood fluctuations; 8) mania; and 9) obsessions and compulsions. Less often, symptoms of profound apathy, monosyllabic responses, and/or indifference to pain occur.

The following examples demonstrate the relationship between impaired executive functions and inappropriate social behaviors:

Case #1

In one case, an elderly woman in her 80's, who had Alzheimer's disease, repeatedly wrote out checks upon seeing her checkbook. After an air-conditioning technician added coolant to her home unit, she wrote \$50,000 worth of checks, which he cashed.

Case #2

In another case, a very wealthy elderly woman, who had suffered several small strokes, held a dinner party. During the dinner, she announced that someone in that room had stolen money from her safe. This was true. She said she had the combination changed to prevent further theft. Remarkably, this woman then announced the new combination. When questioned by her family, she remembered her statements, but did not recognize the incongruity of her behavior.

This same woman also wrote multiple checks for the same item, impulsively bought large quantities of items she never used, and gave cars to strangers. She spent thousands of dollars per month on unneeded, unnecessary, unremembered, and unwanted purchases.

Case #3

A demented elderly man became sexually and financially impulsive. Formerly rigid, exacting, isolative, and tight-fisted, he began propositioning every woman he met, and freely gave away large sums of money. Because his memory was also impaired, he was particularly susceptible to people claiming he promised them money. Furthermore, he erroneously believed he had hundreds of millions of dollars.

A NOTE ABOUT THE "MINI-MENTAL STATE EXAMINATION"

A commonly used test is the "Folstein Mini-Mental State Examination" (MMSE). It is a crude screening tool of cognitive abilities. It has only limited correlation with "real world" abilities or behavior. If an elder's capacity to make medical decisions, provide self-care, execute wills, trusts, or contracts, or engage in any other financial transaction is at issue, the MMSE should be used only as part of an overall evaluation. Relying solely upon the MMSE to assess mental capacity is a misuse of the test.

The MMSE has no value for assessing undue influence.

PRACTICAL USE OF THE FUNCTIONAL APPROACH IN ELDER FINANCIAL ABUSE INVESTIGATIONS

The functional approach may be performed by personnel other than physicians, and it may be performed quickly. Experience with numerous agencies indicates that this method saves time, resources, and money. By creating a clear, logical, and compelling description, this method allows investigators to quickly assess the unique needs of an elder. For example, an impaired person may be able to perform tasks with assistance, as in the following case:

Mr. M was an intelligent, hard-working, elderly man. Following a stroke, he was not able to remember details clearly, but was able to perform complex and logical assessments when information was available in writing. With this accommodation, he continued to oversee his finances, interact

with attorneys, and accountants, and run his business successfully. This information became important when his wife claimed he had been financially abused by a friend.

Others, however, may lack the ability to avoid decisions not in their best interests. Elder abuse investigators routinely learn of cases in which an elder signs a document after repeated requests by a child or neighbor, without understanding the ramifications. Their assets, including their money, homes, furniture, and clothing, may be lost:

Mrs. A was found sitting on a suitcase in the middle of a street. She was frightened and crying, did not recognize her neighbors or neighborhood, and only knew her first name. She no longer knew how to use a telephone. Investigators later learned that Mrs. A signed documents giving her money, home, and furniture to "loving caregivers" who then placed Mrs. A in the street and abandoned her.

These vivid images quickly convey essential information, which results in efficient use of available personnel and resources, while minimizing costs for high-level, expensive medical and neurological consultants.

COMBATING FINANCIAL ABUSE - SUGGESTIONS

There are three general areas to be considered: prevention, intervention, and prosecution.

Prevention

The cornerstone of prevention is early recognition. At this time, most people do not know or understand the nature of elder financial abuse, the effects on victims, families, and community, the behavior of offenders, or the important warning signs. Beliefs amongst law enforcement, Adult Protective Services, medicine, psychology, the courts, and the general public are filled with inaccuracies and misunderstandings. Some of the commonly held harmful myths are:

1. Only people who abused their children become victims.
2. Only stupid, foolish, or incompetent people become victims.
3. Only wealthy people become victims.
4. Elder financial abuse does not occur in minority groups.
5. Elder financial abuse is uncommon.
6. Elder financial abuse does not affect general society.
7. Undue influence does not occur, or is rare.
8. Probable incidents of elder financial abuse cannot be investigated if
the

- elder is incompetent.
9. It is too difficult to interview the elderly.
 10. Cases should not be investigated because the victim may refuse help, or later recant and even defend the perpetrator.
 11. The cases are too time consuming or laborious to investigate or litigate in criminal court.
 12. Elder abuse cases can be adequately investigated and prosecuted by any police or district attorney. No special training is needed.

Some agencies, such as the National Center on Elder Abuse, have started to address these myths, but much more needs to be done. There needs to be a concerted effort to educate professionals and the lay public. Specialized training programs for professionals need to be developed, such as the 40-hour training course developed in Arizona for law enforcement, Adult Protective Services, and attorneys. Physicians and psychologists receive little or no training in elder abuse, undue influence, or the functional model of mental capacity, and therefore also require specialized training. For the lay public, public service announcements, informational pamphlets, and community lectures should be developed and distributed throughout the country. Distribution of materials through financial institutions, senior centers, churches and synagogues, medical centers, and adult residential communities could rapidly and effectively educate large segments of the elder population.

Intervention

Education alone is insufficient. Effective prevention also requires effective intervention. The greatest barriers are the lack of trained personnel and insufficient community resources. The issue of inadequate personnel extends through Adult Protective Services, law enforcement, and the courts. In addition to increasing funding to hire and train more people, agencies may benefit from multi-disciplinary teams of existing specialists. A series of teams, similar to child abuse or domestic violence teams, could provide more comprehensive and efficient service. A "core" team would consist of police, a prosecutor, a social worker, geriatric medicine expert, and geriatric psychiatry or psychology expert. These teams would coordinate the assessment and treatment of victims, and the disposition of cases. In addition, volunteer advisors, such as bankers, realtors, stockbrokers, civil attorneys, accountants, and Area Agency on Aging personnel, may assist by providing information unique to their area of expertise. These teams should exist in every major city, and at least one team in every county. Currently, a few states have all-volunteer multi-disciplinary teams. These are helpful, but not consistently reliable when it comes to attendance and availability.

Prosecution

One of the most prominent barriers to combating elder abuse cases is the lack of dedicated elder abuse prosecution units. Where such units have been created and supported, they are often overwhelmed with cases. Discussions with law enforcement and prosecutors around the country suggests that the rate of convictions is directly related to the knowledge and experience of the attorneys, yet most areas do not provide the needed training and support. One effective unit is located in San Diego, California, and is a good model for the creation of units in other cities.

SUMMARY

Despite extensive human tragedy and loss of billions of dollars per year, elder financial abuse is often overlooked or is handled ineffectively. Many aspects are misunderstood and poorly researched. Effective analysis of potential undue influence situations, perpetrator behavior, and functional assessment of an elder's mental capacity is available, but is not sufficiently used. Many creative responses have been made to address issues of prevention, intervention, and prosecution. These need to be studied for possible replication throughout the country.

Thank you for the opportunity to participate in this hearing. Elder financial abuse is a serious issue that will worsen as the American population ages.

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